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COURT OF APPEAL, FOURTH APPELLATE DISTRICT
DIVISION ONE

STATE OF CALIFORNIA

ANTHONY FARACE, as Trustee, etc.

Plaintiff and Respondent,

v.

ROBERT FEHER,

Defendant and Appellant.

D062012

(Super. Ct. No. 37-2010-00089846-
CU-FR-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Gonzalo P. Curiel, Judge. Affirmed.

Sergio W. Stevens for Defendant and Appellant.

Miller Law Firm, Matthew R. Miller and Carlos Americano for Plaintiff and Respondent.

The trial court in this commercial fraud case found the defendant, a licensed real estate broker, actively concealed from the plaintiff material information with respect to financing the defendant obtained from the plaintiff for a gas station and convenience store in Coachella, California. The trial court awarded the plaintiff \$260,000.

On appeal, the defendant argues the trial court's decision is not supported by sufficient evidence. We affirm. Among other findings, the trial court determined that the plaintiff was credible; that his testimony was corroborated by correspondence between the parties; and that, with respect to critical issues, the defendant's testimony was contradicted by that correspondence. If, as was the case, the plaintiff's testimony is credited, there is more than ample evidence to support the judgment.

FACTUAL BACKGROUND

Defendant and appellant Robert Feher¹ is a licensed real estate broker as well as a licensed mortgage broker. Anthony Farace² owns a small printing business and is an investor.

In 2006, Farace purchased real property from Feher and later provided short-term loans to two of Feher's clients. Farace also provided lease-back equipment financing for one of Feher's other clients.

In March 2008, Feher sent Farace a letter in which he solicited \$261,000 in "bridge financing" for a gas station and convenience store in Coachella owned and operated by a married couple, Joyce Kay and Van Arabian. At the time he made his solicitation to Farace, Feher knew the following facts:

- 1) Kay and Arabian had acquired the business in 2004 for a purchase price of

¹ Unless otherwise indicated, all further references to Feher include defendants and appellants Sell America and US National.

² Unless otherwise indicated, all references to plaintiff and respondent Farace include him in his capacity as trustee of the Farace Family Trust.

\$950,000. Kay and Arabian financed the purchase with a \$575,000 note and first deed of trust, which they gave Presidio Mortgage, and a \$375,000 note and second deed of trust, which the sellers Steve and Kelly Schlachter took.

2) Shortly after Kay and Arabian purchased the business, the Schlachters agreed to reduce the amount of the note and deed of trust they held to a principal amount of \$203,000. However, Kay and Arabian made no payments on the reduced Schlachter note.

3) By August of 2005, Kay and Arabian were in arrears on the Presidio Mortgage note and borrowed \$26,239 from Feher to bring the Presidio Mortgage obligation current. Kay and Arabian combined the \$26,239 loan with \$60,000 Arabian owed Feher with respect to other enterprises and gave Feher a \$86,239 note secured by a subordinate deed of trust. Kay and Arabian made no payments on the \$86,239 Feher note.

4) In May 2007, Feher arranged for Kay and Arabian to borrow a further \$150,000 from Allen and Adrian Taitz, which was secured by a third deed of trust; at that point, Feher's deed of trust was the fourth deed of trust. The proceeds of the Taitz note were used to make needed repairs to underground gasoline tanks that were leaking. Kay and Arabian made no payments on the Taitz note.

5) In February 2008, Kay and Arabian were in default on the Presidio Mortgage note and a trustee's sale was set for March 7, 2008. In an effort to arrange further financing and avoid loss of the property, Feher obtained an agreement from the Schlachters to sell their note to him. Although with unpaid interest the Schlachter note had a face value of \$203,000, the Schlachters agreed to sell it to Feher for \$100,000. The

terms of the agreement are of some significance. The agreement for sale of the note stated in part: "[i]f the [trustee's] sales were to occur, it is agreed that the likely outcome would be that the property would be sold for an amount less than the sum total of indebtedness to all outstanding lien holders.'" At that point, there were less than \$1.2 million in encumbrances on the business.

Notwithstanding Feher's recent agreement that the property would not satisfy all of its encumbrances at a trustee's sale, in March 2008, Feher represented to Farace that the property had a value of \$1.45 million. He supported this representation by providing Farace with a late 2006 appraisal of the property, which valued it at \$1.4 million, and a year-old \$1.45 million offer Van and Arabian had received before leaks in the gasoline tanks had been discovered.

Although Feher disclosed the property was in foreclosure, he did not disclose Kay and Arabian's consistent inability to ever make payments on their subordinate debt. Feher also disclosed his own note and deed of trust, which by that point had a face value of \$106,000. However, Feher represented that the note had been used to fund improvements when, in fact, the note represented funds needed to bring current the Presidio Mortgage note and Arabian's prior unrelated debt.

Feher also represented to Farace that the "Valero Corp." had agreed to rebrand the station as a Valero gas station because of its location. Feher told Farace that once the Presidio Mortgage note was made current and the Schlachter note was satisfied, there would be \$20,000 available from the new financing to obtain needed inventory; according to Feher, these events would in turn permit the Valero rebranding and, at that

point, Feher would be able to refinance the entire enterprise and pay off Farace's loan.

Feher did not disclose to Farace the terms of his agreement with the Schlachters to purchase their note for \$100,000 and, most particularly, the statement in the agreement that acknowledged the property's encumbrances exceeded its likely sale price. Rather, the loan agreement Feher prepared simply stated that the Schlachters, rather than Feher, would sell their note to Farace for \$100,000. Also, Feher did not disclose that the previous trustee's sale had been postponed until March 7, 2008.

On March 6, 2008, Farace signed the loan agreement and, on March 8, 2008, he wired Feher \$238,000. For their part, Kay, Arabian and the entity that held title to the gas station and convenience store, Old Town Station, Inc. (Old Town Station), gave Farace a note for \$261,000 which, in addition to compensating Farace for the amounts he advanced, also represented payment of \$23,000 in prepaid interest and discount fees.

Initially, Feher used the proceeds of the Farace loan to bring the Presidio Mortgage loan current and to purchase the Schlachter note. Over the following months, Feher used funds from the bank account where he held the loan proceeds to cure new defaults on the Presidio Mortgage and Taitz notes. Farace's note was due on September 30, 2008, and was not paid.

Feher foreclosed on his own note and deed of trust in April 2009 and obtained the gas station and convenience store subject to the senior encumbrances. In October 2009, Presidio Mortgage foreclosed on its note and deed of trust and obtained \$694,000 at a trustee's sale. The Presidio Mortgage foreclosure eliminated Farace's subordinate interest in the business.

PROCEDURAL HISTORY

On April 13, 2010, Farace filed a complaint against Feher, Kay, Arabian and Old Town Station. As against Feher, Farace alleged causes of action for fraud, breach of fiduciary duty and negligence.

Kay, Arabian and Old Town Station were defaulted. Following a trial, the court found in favor of Farace on all three of his causes of action against Feher and awarded Farace \$261,000 in damages. As we noted at the outset, the trial court found "Farace was credible in his testimony as to the disputed issues of fact. Farace's testimony was corroborated by the letters, e-mails and documents which were admitted into evidence. Meanwhile, Feher's testimony on critical issues was contradicted by letters that he wrote, and e-mails exchanged between the parties"

Feher filed a timely notice of appeal.

DISCUSSION

On appeal, Feher argues the trial court's findings are not supported by sufficient evidence. For a variety of reasons, we must reject this argument.

I

As Farace points out, when a judgment is challenged on the grounds it is not supported by sufficient evidence in the record, the appellant is obligated to present all material evidence on the issues presented and not merely the evidence that supports the appellant's position. (*Brockey v. Moore* (2003) 107 Cal.App.4th 86, 96; *Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881.) "Unless this is done the error is deemed to be waived." (*Foreman & Clark Corp. v. Fallon, supra*, at p. 881.)

Although in his brief on appeal Feher challenges the sufficiency of the evidence, the brief fails to discuss the complete record, including the material evidence that supports the trial court's finding. Feher's brief does not discuss the fact that at the time Feher was representing to Farace that the gas station and convenience store had a value of \$1.45 million, Feher had recently signed an agreement that conceded the value of the property would not satisfy the Schlachter, Taitz or Feher encumbrances. Feher's brief does not discuss Feher's failure to disclose that the trustee's sale was scheduled for the day Farace funded his loan.

Moreover, Feher's brief does not discuss the fact that although Feher represented to Farace his loan was for improvements, it in fact represented payments Feher made to bring current the Presidio Mortgage loan and Arabian's prior unrelated debt obligations. Feher also fails to discuss the fact that Kay and Arabian never made any payments on any of the subordinate loans.

Feher's failure to discuss the evidence that supports the trial court's findings and judgment waives his right to attack the sufficiency of the evidence, and we can affirm the judgment on that basis alone. (*Brockey v. Moore, supra*, 107 Cal.App.4th at p. 96; *Foreman & Clark Corp. v. Fallon, supra*, 3 Cal.3d at p. 881.)

II

Even if Feher had discussed the entire record, we would be compelled to affirm the judgment. The record fully supports the judgment.

A. *Substantial Evidence Review*

When the sufficiency of the evidence is challenged on appeal, we "review the

whole record in the light most favorable to the judgment [or order] below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value" (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) In viewing the evidence favorably to the judgment or order, we must also "'presume in support of the judgment [or order] the existence of every fact the trier could reasonably deduce from the evidence. [Citation.] If the circumstances reasonably justify the trial court's findings, reversal is not warranted merely because the circumstances might also be reasonably reconciled with a contrary finding. [Citations.]"' (*In re Ryan N.* (2001) 92 Cal.App.4th 1359, 1372.)

We agree with Feher that substantial evidence does not mean *any* evidence but rather requires evidence that is of ponderable legal significance. (See *In re Angelia P.* (1981) 28 Cal.3d 908, 924; *Young v. Gannon* (2002) 97 Cal.App.4th 209, 225.) The evidence presented by Farace in support of his claims readily meets this standard.

B. *Fraud*

In arguing the record does not support the trial court's finding he engaged in deceit, Feher contends that had Farace examined the documents Feher sent him more thoroughly, Farace would have discovered the full extent of the risk the transaction presented. The record here entirely rebuts this argument.

The credit and title reports that were presented to Farace, which Feher relies upon, would not have alerted Farace to the fact that Feher himself did not believe the property had enough value to satisfy its encumbrances. The reports that were provided to Farace would not have disclosed to Farace that Feher's own note did not represent financing for

any improvements but only funds to pay the Presidio Mortgage and substantial pre-existing debt. The reports, although they would have disclosed Kay and Arabian were delinquent on the Presidio Mortgage, would not have disclosed to Farace that Kay and Arabian had not made any payments on the junior encumbrances. These undisclosed circumstances would have been material to any assessment of the risk of the transaction; they would bear directly on the value of the security being offered to Farace as well as Kay and Arabian's ability and willingness to meet their financial obligations. Feher's concealment of these material facts in turn supports the trial court's finding of deceit.

C. Fiduciary Duty

Although the trial court found Feher did not act as Farace's real estate broker in the loan transaction, it nonetheless found Feher's conduct made him a joint venturer with Farace. The trial court further found that as a joint venturer, Feher owed a fiduciary duty to Farace, including the duty to disclose all he knew about the risks posed by the transaction.

Contrary to Feher's argument on appeal, the trial court's joint venture finding is amply supported by the record. Feher was plainly acting throughout the transaction to protect his own substantial interest in the gas station and convenience store, which interest he disclosed to Farace. Feher's activity included not only his solicitation of Farace's investment but also his negotiations with the Schlachters, his disbursement of the funds obtained from Farace, and his apparent retention of some of them after bringing the Presidio Mortgage loan current. Importantly, Feher's joint venture acts also included his stated intent to later obtain refinancing for the business.

This course of conduct, by which Feher acted in his own interest, Kay and Arabian's interest, and Farace's interest, went well beyond what would be expected of a broker acting on behalf of a borrower in a loan transaction and, instead, had all the characteristics of a joint enterprise or partnership with the manifest goal of making sure that all junior encumbrances were satisfied. (See *In re Marriage of Ceraci* (2006) 144 Cal.App.4th 1278, 1292 [partnership created where the parties "actions and behavior demonstrate an intent to engage in business together"].) In light of the de facto joint venture or partnership Feher's course of conduct created, the trial court was fully warranted in imposing on Feher the duties of a fiduciary and, in particular, the duty to disclose to other joint venturers all that he knew about the risks of the transaction.

D. Negligent Representation

In light of the fact that shortly before soliciting Farace's participation Feher stated in writing that the property would not satisfy the junior encumbrances, he was at the very least negligent in nonetheless providing Farace with information about the year-old \$1.4 million appraisal and the 2007 \$1.45 million conditional offer. Thus, the finding of negligent misrepresentation as an alternative theory of liability is fully supported by the record.

DISPOSITION

The trial court's findings and judgment are supported by substantial evidence. The judgment is affirmed. Farace to recover his costs of appeal.

BENKE, Acting P. J.

WE CONCUR:

NARES, J.

McINTYRE, J.